

# The Advocate



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## Padilla v. Kentucky: Three Years Later

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### Overview

This article provides a thumbnail sketch of the aftermath of the Supreme Court's decision in *Padilla v. Kentucky*.<sup>1</sup> Certain issues now have answers and others remain unresolved. In *Padilla*, the Court held that failure to advise about the deportation consequences of a conviction fell below the standard of care that a criminal defense attorney owes a client under the Sixth Amendment to the United States Constitution.

The Court also held that whether deportation was a direct or collateral consequence was not appropriate to determine the scope of defense counsel's Sixth Amendment obligations because of the nature of banishment from the United States.<sup>2</sup> Deportation, however, is not the only consequence previously labeled "collateral," about which a criminal defense practitioner has an obligation to advise her client correctly. In *Commonwealth v. Pridham*,<sup>3</sup> the Kentucky Supreme Court held that defense counsel's representation fell below the requisite standard of care by failing to advise the defendant that his guilty plea would render him a "violent offender," which would require him to serve more time before he could qualify for parole.

### Role of Indigent Defense Counsel

Before *Padilla*, the approach to advising about immigration consequences matched the bell curve that is familiar to anyone with a basic knowledge of statistics. A relatively small percentage of criminal defense practitioners followed best practices and always advised regarding immigration consequences. A majority of practitioners tried to answer questions when asked or said "You need to consult with immigration lawyer." A small percentage of practitioners dismissed their clients concerns with something like "That's not my job."

Since *Padilla*, the statistically largest group of practitioners described above has faced the somewhat daunting task of learning about a complicated area of law. The Defending Immigrants Partnership ([defendingimmigrants.org](http://defendingimmigrants.org)), a collaboration among the Immigrant Defense Project, Immigrant Legal Resource Center, and the National Immigration Project of the National Lawyers Guild, has produced practice advisories, provided organizational technical assistance and conducted national and local training with public defender offices to assist the indigent criminal defense bar in dealing with the somewhat daunting task of implementing the *Padilla* decision.

As might have been predicted, the indigent criminal defense bar has not responded monolithically to the decision. Budget crises and staffing cutbacks have hindered broad implementation in some states. Kentucky, however, stands as an exemplar in terms of its response to the decision.

The Kentucky Department of Public Advocacy (DPA) responded immediately to the requirements of *Padilla* through implementation of tiered system of immigration training and support for its defenders throughout the state. Each DPA office has one person designated as the immigration specialist for that office. These specialists receive on-going training on the intersection of criminal and immigration law. These specialists are expected to share the training they receive and answer basic immigration questions as they arise in their respective offices.

DPA also created a position through the Equal Justice Works/Public Defender Corps program for Public Defender Corps fellow, Kate Benward, to receive on-going immigration training and support. She works as a more specialized contact person for each office's designated immigration specialists. Anyone from any DPA office can

## Vital New Resource: Immigration Consequences Chart

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The Supreme Court's ruling in *Padilla v. Kentucky* requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea; absent such advice, a noncitizen defendant may raise claims of ineffective assistance of counsel.<sup>1</sup>

### Introduction to the Immigration Chart

The immigration chart is a crucial part of DPA's efforts to ensure that all of its public defenders are able to provide competent, affirmative advice to non-citizens about the consequences of criminal conviction. The chart is intended to be a tool that provides generalized advice about the adverse immigration

consequences that flow from conviction of selected Kentucky offenses. It cannot be relied on as a definitive advice about the immigration consequences your client will face; the purpose of the chart is to allow criminal defense attorneys to minimize the immigration risks of a given criminal charge and in some instances provide tips that allow a defense attorney to craft a safer plea for the client.

Immigration Chart can be found at  
[tinyurl.com/dpachart](http://tinyurl.com/dpachart)  
or at [dpa.ky.gov](http://dpa.ky.gov)

This article will discuss the terminology used in the chart as well as some of the basic immigration concepts that a criminal defense attorney must be familiar with in order to effectively advise clients on the immigration consequences of a criminal conviction.

### I. Client intake and determining immigration status:

To begin analysis of your client's immigration and defense goals, you will need to gather facts about the client's immigration status, which can be ascertained through a client intake sheet, and her criminal history.<sup>2</sup> It is always important to determine whether the defendant's family can retain an immigration expert with whom you can confer. The types of immigration statuses to look for include U.S. citizen, legal permanent resident (green card holder), lawful non-immigrant (e.g. H1B visa), refugees and asylees, temporary protected status, and undocumented (including non-citizens who have lost their status).

### II. Deportability and Inadmissibility:

After ascertaining your client's immigration status, you will need to consider the categories of "deportability"<sup>3</sup> and inadmissibility<sup>4</sup> in working to achieve your client's defense/immigration goals.

**Deportability:** A non-citizen who has been admitted to the United States and gained legal status through the Department of Homeland Security is concerned with avoiding deportation. This includes both the category of immigrant (e.g. legal permanent resident (LPR)) and non-immigrants (e.g. visitors and students admitted to the U.S. on short term visas). Lawfully admitted immigrant and non-immigrants can lose this status and be deported if convicted of a deportable offense. An admitted person's highest priority is to avoid becoming deportable because of conviction for an aggravated felony. The next priority is to avoid the grounds of deportability that are triggered by the following: crimes of domestic violence, stalking, certain judicial finding of a violation of certain DV protection orders, firearms offense, a crime involving moral turpitude (2 convictions after admission, one conviction with max sentence of one year, committed within 5 years of admission), conviction of an offense relating to controlled substance (except less than 30 g. marijuana), drug addict or abuser any time after admission, or conviction for running a prostitution business. If an LPR is not convicted of an aggravated felony, she might still be eligible for some forms of relief if convicted of only a deportable offense.

<sup>1</sup> 130 S. Ct. 1473 (2010).

<sup>2</sup> Defenders can find a sample intake form at: <http://defendingimmigrants.org> (Item number 7 under *Padilla v. Kentucky*: Basic Materials).

<sup>3</sup> The grounds of deportability are listed in 8 USC § 1227(a).

<sup>4</sup> The grounds of inadmissibility are listed in "inadmissibility" in 8 USC § 1182(a).

<sup>1</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

<sup>2</sup> *Padilla*, 130 S. Ct. at 1481-82.

<sup>3</sup> --- S.W.3d ---, 2012 WL 5274654 (Oct. 25, 2012).

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## Padilla v. Kentucky: Three Years Later (cont'd)

contact Kate directly with specific questions about a case and client or with general questions about immigration that Kate can advise on or consult with outside immigration experts as needed. She provides continued training and outreach to the immigration specialists in each office.

### Defense Counsel's Duties under *Padilla*

Courts have not conclusively established the exact parameters of defense counsel's obligations under *Padilla*. One of the most confusing parts of the *Padilla* decision is the language stating that, when consequences are unclear or uncertain, a lawyer need do "no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."<sup>4</sup> Since defense counsel cannot determine the clarity or certainty of the consequences until after investigating law and facts, the most logical reading of that language would seem to indicate that the Court intended for defense counsel to advise in all cases, but give conclusive advice in "clear" cases only.<sup>5</sup> A fair description of defense counsel's obligations arguably includes:

- Ascertaining the defendant's goals
- Plea bargaining to avoid or reduce adverse immigration consequences;
- Investigating immigration facts, (e.g., a defendant's immigration status), research relevant immigration laws, and apply them to a client's individual situation; and
- Defending the client's interest through negotiation or litigation.

### Role of Prosecutors

In the three years since the United States Supreme Court decided *Padilla*, the responses from prosecutors, and judges implementing the decision have varied widely too.<sup>6</sup> In some counties, district attorneys have created specific policies to provide direction to assistant prosecutors. In Santa Clara County, California, for example, the District Attorney has instructed prosecutors that they should "consider and, if appropriate, take reasonable steps to mitigate" potential adverse immigration consequences when conducting settlement negotiations where the immigration consequences are disproportionate to the punishment for the charged offense.<sup>7</sup> Unfortunately, in many other jurisdictions, prosecutors appear more interested in ensuring that a plea withstands a future post-conviction challenge rather than pursuing justice in an individual case.<sup>8</sup> In some parts of the country, prosecutors are requiring defendants to waive future ineffective assistance of counsel claims as part of all plea agreements with noncitizen defendants. The National Association of Criminal Defense Lawyers (NACDL) is collecting reports of such problems.<sup>9</sup>

Before *Padilla*, prosecutors often would reject efforts to bargain about immigration consequences by saying something like, "I don't treat noncitizens differently from citizens, because it would be unfair." The *Padilla* decision provides a cogent rejoinder to those arguments. The *Padilla* Court recognized that "Counsel who possess the most rudimentary understanding of the deportation consequences . . . may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation."<sup>10</sup> In mentioning how factoring immigration consequences into the plea bargaining process could benefit both the prosecution and the defense, the Court made it clear that it's view is essentially at odds with any prosecutor's view that it would be discriminatory against citizen defendants for them to bargain about immigration consequences with noncitizen defendants.<sup>11</sup>

### Role of Judges

A judge has no direct role in implementing the Court's *Padilla* decision, which was a Sixth Amendment case that addressed ineffective assistance. In this context, a judge's role is to ensure that any plea taken is knowing and voluntary.<sup>12</sup> There is a potential tension between a judge asking too many questions about whether and

<sup>4</sup> *Padilla*, 130 S. Ct. at 1483.

<sup>5</sup> See *Padilla*, 130 S. Ct. at 1483 n.10 (discussing obligation in unclear cases); see also Lindsay Nash, CONSIDERING THE SCOPE OF ADVISAL DUTIES UNDER PADILLA 33 *Cardozo L. Rev.* 549, 553 (2011).

<sup>6</sup> Robert M. A. Johnson, A PROSECUTOR'S EXPANDED CONSEQUENCES UNDER PADILLA, 31 *St. Louis U. Pub. L. Rev.* 129, 130 (2011).

<sup>7</sup> Memorandum from Jeff Rosen, Dist. Att'y, to Fellow Prosecutors, on Collateral Consequences (Sept. 14, 2011).

<sup>8</sup> See generally Heidi Altman, PROSECUTING POST-PADILLA: STATE INTERESTS AND THE PURSUIT OF JUSTICE FOR NONCITIZEN DEFENDANTS, 101 *Geo. L.J.* 1 (2012).

<sup>9</sup> Contact Dan Kesselbrenner at [dan@nipnl.org](mailto:dan@nipnl.org) for a copy of the NACDL materials.

<sup>10</sup> *Padilla*, 130 S. Ct. at 1486.

<sup>11</sup> *Id.*

<sup>12</sup> See *Boykin v. Alabama*, 395 U.S. 238 (1969); *Fed. R. Crim. P.* 12.

In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) the United States Supreme Court found that Mr. Padilla's petition had stated a viable claim for relief, and remanded the case back to Kentucky for an evidentiary hearing where Mr. Padilla would have the opportunity to establish (a) that he was not properly advised of the deportation consequences of his plea (deficient performance), and (b) that but for the improper advice, he would not have pled guilty (prejudice). On remand, it became apparent that trial counsel had not given Mr. Padilla the required advice. On the issue of prejudice, the Commonwealth relied on language in the United States Supreme Court opinion that prejudice is not established if there was no "rational basis" to reject the plea, arguing that in this case Mr. Padilla stood no significant chance of acquittal, and the agreement was favorable. The Kentucky Court of Appeals disagreed, finding that in evaluating prejudice:

. . .[t]he court must determine whether the defendant's rejection of the plea offer would have been a rational choice, even if not the best choice. Necessarily, the court must consider the importance a particular defendant places upon preserving his or her right to remain in this country. A noncitizen defendant with significant ties to this country may rationally be willing to take the risk of a trial while the same decision by one who has resided in the United States for a relatively brief period of time or has no family or employment in this country may be irrational. *Padilla v. Commonwealth*, 381 S.W.3d 322, 329 (Ky. App. 2012).

Reviewing Mr. Padilla's case, the court found that he had a viable defense, his plea was not especially favorable, and he had such close ties to the United States that deportation would have been an extremely harsh consequence on the facts of his case. Accordingly, the Kentucky Court of Appeals ordered the judgment vacated.

how defense counsel satisfied her obligations under *Padilla*, on the one hand, and interfering with a defendant's relationship with counsel, on the other hand.

Thirty United States jurisdictions require a judge to warn a defendant regarding the potential immigration consequences of a guilty plea.<sup>13</sup> A judge who asks a defendant about her immigration status may be committing ethical<sup>14</sup> or statutory violations,<sup>15</sup> or both.

### Retroactivity

On February 20, 2013, the Court held in *Chaidez v. United States*, Case No. 11-820, -- U.S. --, 133 S.Ct. 1103 (Feb. 20, 2013), that the *Padilla* decision is not retroactive under *Teague v. Lane*, 489 U.S. 288 (1989), the test for retroactivity in federal post-conviction relief cases. That is to say, that the *Padilla* decision does not apply to cases that already were final on March 31, 2010, the date the Court decided *Padilla*. Fortunately, states are free to create retroactivity rules that are more favorable than *Teague*.<sup>16</sup> Maryland, for example, already has adopted such a broader rule, which means that people in Maryland can continue to bring *Padilla* claims for cases that were final on March 31, 2010.<sup>17</sup>

### Conclusion

This year marks the fiftieth anniversary of the Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), requiring states to provide counsel to indigent defendants. Fulfilling the promise of that decision is an ongoing process for all involved in the criminal justice system. One step in that process is implementing the decision in *Kentucky v. Padilla*. As Justice Stevens wrote for the Court:

It is our responsibility under the Constitution to ensure that no criminal defendant-whether a citizen or not-is left to the "mercies of incompetent counsel." To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.<sup>18</sup>

<sup>13</sup> Dan Kesselbrenner and Lory Rosenberg, *Immigration Law and Crimes*, Appendix A (Thompson Reuters 2013).

<sup>14</sup> See, e.g., Maryland Judicial Ethics Committee Op. No. 2008-43 (finding that judges should not compel defendants to discuss their immigration status during criminal proceedings).

<sup>15</sup> See, e.g., Cal. Penal Code § 1016.5; Neb. Rev. Stat. § 29-1819.02; Wash. Rev. Code § 10.40.200.

<sup>16</sup> *Danforth v. Minnesota*, 552 U.S. 264 (2008).

<sup>17</sup> *Denisyuk v. State*, 422 Md. 462 (2011).

<sup>18</sup> *Padilla*, 130 S. Ct. at 1486 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).



Tim Arnold  
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Director

## Vital New Resource: Immigration Consequences Chart (cont'd)

**Inadmissibility:** The grounds of inadmissibility apply to those non-citizens who came into the United States without appearing before an immigration officer (i.e. crossed the border without inspection) and to someone seeking to immigrate to the U.S., who may seek to apply for admission to the United States in the future. Someone who did not present herself to an immigration official lacks documentation permitting her stay in the United States and is already deportable. This person's primary concern is or maintaining eligibility to gain legal status in the future.

The grounds of inadmissibility are triggered by both convictions and non-convictions. The first major ground of inadmissibility applies to a non-citizen convicted of, or who formally admits to, a crime involving moral turpitude. There is a *petty offense exception* to inadmissibility for a crime involving moral turpitude if the client does not have a prior conviction for a crime involving moral turpitude, the conviction carries the maximum sentence of a year or less, and the sentence imposed was six months or less. Another exception to automatic inadmissibility for a crime involving moral turpitude is for "youthful offenders," which includes a non-citizen convicted as an adult of only one crime of moral turpitude that was committed while under the age of 18, and the conviction or imprisonment occurred at least five years ago.

Further grounds of inadmissibility that do not require a criminal conviction include offenses relating to a controlled substances, evidence that the person is a drug addict or drug abuser, and if the Government has a "reason to believe" the person was or helped a drug trafficker, or engaging in prostitution. Inadmissibility is also triggered where a non-citizen receives a five year aggregate sentence for two or more convictions of any type.

There is no per se bar on aggravated felonies, grounds of domestic violence, child abuse, stalking, or firearms; however, many of these but many of these offenses are likely to fall into another inadmissibility category, such as a crime involving moral turpitude.

It should be noted that for a client with lawful status, her concern is generally the category of deportability, not inadmissibility; however, if the client leaves the country *after* becoming inadmissible, she will be denied readmission the country and should be advised not to leave the U.S.

### III. Aggravated Felony(AF):

All non-citizens, whether concerned with deportability or inadmissibility, should avoid an aggravated felony conviction. An aggravated felony under immigration law can be either a felony or misdemeanor, and refers to the category of offense that carries the most severe immigration consequences. If convicted of an aggravated felony, a non-citizen will face mandatory detention, nearly certain deportation, and ineligibility for most forms of relief.<sup>5</sup>

Common criminal offenses that are aggravated felonies, regardless of the sentence, include murder, rape, sexual abuse of a minor, drug-trafficking crimes (covers wide range of drug offenses, not just drug-trafficking), felon in possession of a firearm, child pornography, and deceit or fraud where the loss to the victim exceeds \$10,000. These offenses have been generically defined by immigration and federal circuit courts, and the state offenses must fit this generic definition in order to qualify as an aggravated felony.

Theft, burglary, crimes of violence (COV),<sup>6</sup> perjury, bribery of a witness, obstruction of justice, alien smuggling, forgery, counterfeiting, and altering a VIN are generally aggravated felonies where a sentence of 365 days or more is imposed. The chart indicates that where this category of aggravated felony applies, a sentence of **364 days** or less will avoid the one year threshold and potentially save your client from an aggravated felony conviction.

### IV. Crime Involving Moral Turpitude (CIMT):

Crimes involving Moral Turpitude (CIMT) trigger both grounds of deportability and inadmissibility, but unlike an aggravated felony conviction, a CIMT conviction does not make a non-citizen removable in every case. This category has been vaguely defined as a "reprehensible act" with a *mens rea* of at least recklessness. If the statute does not have as an element specific intent, deliberateness, willfulness, or recklessness,<sup>7</sup> then it will not be considered a CIMT.

<sup>5</sup> There are several exceptions to this bar, including applicants for the "T" or "U" visas (for persons who are victims of alien smuggling or a serious crime and who cooperate with authorities in prosecuting the crime) See 8 USC § 1101(a)(15)(T) and (U).

<sup>6</sup> Crimes of Violence (COV) constitute an aggravated felony where a sentence imposed is one year (365) days or more. A crime of violence is defined in 18 U.S.C. § 16 a & b:

- an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or
- any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (a) applies to either a misdemeanor or felony conviction, and requires that the statute have physical force as an element of the offense. 18 U.S.C. § 16(a) requires a felony conviction, but physical force need not be an element of the offense.

<sup>7</sup> *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

Crimes involving moral turpitude have been interpreted to include crimes involving theft or an intent to defraud; an intent to cause bodily harm; reckless crimes that result in serious bodily harm; some drug trafficking offenses; and most offenses involving sexual conduct.

### V. Controlled Substance Offenses (CSO):

Controlled substance offenses (CSO) trigger the grounds of deportability and inadmissibility. The category includes offenses "relating to" a controlled substance as defined by federal law and is broadly interpreted by immigration courts.<sup>8</sup>

**Deportability for Controlled Substance Offenses:** A non-citizen convicted of an offense relating to a controlled substance is deportable and subject to removal from the United States. A non-citizen with a solicitation conviction will also fall under the controlled substances ground of deportability. There is an exception for a conviction of a "single offense involving possession for one's own use of thirty grams or less of marijuana."<sup>9</sup>

**Inadmissibility for controlled substance offenses:** A single conviction for any controlled substance offense triggers inadmissibility, but it is sufficient for the non-citizen to make a formal, knowing, admission of a drug offense to a Department of State or an INS official. There is no exception for 30 grams or less of marijuana like there is for drug deportability, but a person with only one conviction of possession of less than 30 grams of marijuana may be eligible to apply for a "waiver of inadmissibility" based on hardship to relatives.

### VI. Crimes against Children (CAC):

A crime against children conviction triggers the grounds of deportability. The deportability grounds for a CAC conviction will only apply where the minor age of the child is an element of the statute of conviction. Though a CAC is not a specific ground of inadmissibility, it could also qualify as a CIMT.

### VII. Crimes of Domestic Violence (CODV):

Crimes of Domestic Violence triggers the grounds of deportability (is not a specific ground of inadmissibility unless also a crime of moral turpitude). In order to qualify as a CODV, the offense must qualify as "crime of violence" (discussed *supra* in footnote 4) and the offense must have been committed against a person with whom the non-citizen shares a domestic relationship as defined in the Immigration Code.<sup>10</sup>

### VIII. Firearms Offenses (FO):

A firearms offense (FO) triggers the grounds of deportability and is broadly defined to include the purchase, sale, possession use, ownership, or carrying of a firearm or destructive device. A FO is not a specific ground of inadmissibility.

### IX. Record of Conviction (ROC):

The Record of Conviction (ROC) refers to the documents that can be reviewed by the immigration judge, and is generally limited to the statutory definition of the crime, charging documents (only those counts which defendant plead to, not dismissed counts or charges), the written plea agreement, transcript of plea colloquy and any explicit finding of court to which defendant assented.

### X. Divisible Statutes:

A statute is "divisible" if it criminalizes offenses that both carry immigration consequences and do not. Divisible statutes can be used to the client's advantage to construct a plea that limits damage to a non-citizen's immigration status.

### XI. Convictions and Sentences under Immigration Law

A sentence is defined as "any formal judgment of guilt entered by a court where the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty," whether this time is served in jail, probated or suspended. A juvenile court disposition is not a conviction, nor is a pre-plea diversion such as a deferred prosecution under KRS 218A.14151. A "restraint on liberty" has even been interpreted to include court fines, so generally it is in a client's best interest to avoid a conviction by obtaining a deferred prosecution or an informal agreement with the prosecution that does not include a court order.

### XII. Conclusion

This chart and the terms discussed above contain a brief overview of a complex area of law that will continue to be updated as the law changes. For a longer version of this article, go to [tinyurl.com/dpachart](http://tinyurl.com/dpachart) or [dpa.ky.gov](http://dpa.ky.gov).

<sup>8</sup> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable. INA § 237(a)(2)(B)(i).

<sup>9</sup> 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i). This exception has also been expanded.

<sup>10</sup> 8 U.S.C. 1227 (a)(2)(E)(i). (Includes a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.)



# Department of Public Advocacy

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### ***Padilla v. Kentucky Update***

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